

A **Capt Alimuddin bin Tufail Muhd v Lembaga
Pelabuhan Kelang**

B HIGH COURT (SHAH ALAM) — ORIGINATING MOTION NO 25-41-93
KC VOHRAH J
2 MARCH 1994

Public Authorities — Port authorities — Accident at sea — Applicant no longer in the employ of the authority when accident occurred — Whether authority had jurisdiction to revoke applicant's pilot licence after collision — Port Authorities Act 1963 s 29CA & H(5)

C On 28 May 1993, the applicant was instructed to board MVN
Rochester as a pilot. As he was proceeding towards the vessel, the
vessel became involved in a collision with a tanker. It appeared that
the applicant had spoken to the master of MVN Rochester and had
given him some advice before the collision took place. On 14 June
D 1993, the Pilotage Committee, a committee constituted under the
Port Authorities Act 1963 ('the Act') held an inquiry and on 13 July
1993, a statutory body ('the authority') also constituted under the Act,
suspended the applicant's pilot's licence for one month with effect
from 15 July 1993 and required him to take an oral examination
E conducted by the Pilotage Committee. The applicant applied for an
order of certiorari to quash the decision of the authority.

Held, allowing the application:

F The applicant left the employment of the authority on 1 December
1992. For the period that he worked with the authority, he had a
licence issued to him by the authority. When he became an employee
of a private company, he was not issued with a pilot's licence under
s 29CA of the Act. The authority seemed unaware of s 29H(5) which
rendered the pilot's licence of the applicant, issued by the authority,
invalid when he left the employment of the authority. Thus, when the
G authority purported to deal with the applicant, the wrong assumption
it took was that the applicant was subject to its jurisdiction. It assumed
either that the applicant had an authority pilot's licence or that he had
a pilot's licence issued to him by virtue of his being an employee of a
licenced operator under s 29CA. But there must be in existence
jurisdictional facts showing that he had an authority pilot's licence or
H a licence under s 29CA before the authority can have jurisdiction over
the matter. In the circumstances, certiorari shall issue to quash the
decision of the authority.

[Bahasa Malaysia summary]

I Pada 28 Mei 1993, pemohon telah diarahkan supaya menaiki MVN
Rochester sebagai seorang malim. Semasa beliau menghampiri kapal
itu, telah berlaku suatu kemalangan di antara kapal itu dengan sebuah
kapal tangki. Nampaknya, pemohon telah bercakap dengan nakhoda

kapal MVN Rochester dan telah memberi beliau arahan sebelum kemalangan itu berlaku. Pada 14 Jun 1993, Jawatankuasa Pilotage, sebuah jawatankuasa yang telah ditubuhkan di bawah Akta Lembaga Pelabuhan 1963 ('Akta itu') telah mengadakan suatu penyiasatan dan pada 13 Julai 1993, sebuah badan berkanun ('pihak berkuasa itu') yang juga telah ditubuhkan di bawah Akta itu, telah menggantung lesen malim pemohon untuk sebulan mulai 15 Julai 1993 dan telah mewajibkan beliau supaya menjalani suatu ujian lisan yang diadakan oleh Jawatankuasa Pilotage. Pemohon telah memohon untuk suatu perintah certiorari untuk membatalkan keputusan pihak berkuasa itu.

Diputuskan, membenarkan permohonan itu:

Pemohon telah berhenti bekerja dengan pihak berkuasa itu pada 1 Disember 1992. Untuk tempoh beliau bekerja dengan pihak berkuasa itu, beliau telah diberikan suatu lesen oleh pihak berkuasa itu. Apabila beliau mula bekerja dengan sebuah syarikat swasta, beliau tidak diberi suatu lesen malim di bawah s 29CA Akta itu. Pihak berkuasa itu nampaknya tidak sedar akan s 29H(5) yang menjadikan lesen malim pemohon, yang telah dikeluarkan oleh pihak berkuasa itu, tidak sah apabila beliau berhenti bekerja dengan pihak berkuasa itu. Oleh itu, apabila pihak berkuasa itu bertindak terhadap pemohon itu, anggapan salah yang telah dibuat adalah bahawa pemohon berada di bawah bidang kuasanya. Ia menggangap bahawa pemohon sama ada mempunyai suatu lesen malim pihak berkuasa atau bahawa beliau mempunyai suatu lesen malim yang telah dikeluarkan kepadanya kerana beliau merupakan seorang pekerja suatu pengendali berlesen di bawah s 29CA. Tetapi mesti terdapat kehadiran fakta mengenai bidang kuasa yang menunjukkan bahawa beliau mempunyai suatu lesen malim pihak berkuasa atau lesen di bawah s 29CA sebelum pihak berkuasa itu boleh mempunyai bidang kausa terhadap perkara itu. Di dalam keadaan sedemikian, certiorari akan diberikan untuk membatalkan keputusan pihak berkuasa itu.]

Notes

For cases on port authorities, see 10 *Mallal's Digest* (4th Ed) paras 1235–1236.

Case referred to

- 1 *Mak Sik Kwong v Minister of Home Affairs, Malaysia* (No 2) [1975] 2 MLJ 175 (refd)

Legislation referred to

Port Authorities Act 1963 s 29H(5), J(2)

P Kuppusamy and *R Sativale* (*Sativale & Associates*) for the applicant.
YK Choo (*Nik Saghir and Ismail*) for the respondent.

- A KC Vohrah J:** This is an application by Capt Alimuddin bin Tufail Muhd for an order of certiorari to quash the decision of the respondent, a statutory body ('the authority') constituted under the Port Authorities Act 1963 (Rev 1992) ('the Act'). In a letter dated 13 July 1993 to the applicant, the authority intimated to the applicant that the authority had reached a decision to suspend his pilot's licence with effect from 15 July 1993 for one month and to require the applicant to take an oral examination which was to be conducted by the Pilotage Committee.

B I would like to state here that at the commencement of the hearing of this case a few days ago, counsel for the authority raised a preliminary objection, arguing that the applicant had no locus standi to take up the proceedings as
C '(the) authority had no right to hold the inquiry because there was no licence to revoke'. I overruled the objection and stated that the issue of there being no licence to revoke should be taken up in fuller argument later at the hearing of the application.

D *Background*

On 28 May 1993, the applicant was instructed to board MVN Rochester as a pilot. As he was proceeding towards the vessel, the vessel became involved in a collision with a tanker, MT Gloria. It appeared that the applicant had spoken to the master of MVN Rochester and had given him some advice
E before the collision took place.

On 14 June 1993, the Pilotage Committee, a committee constituted under s 29E of the Act, held an inquiry (see a copy of the notes of proceedings of the committee marked AT1 exhibited in the affidavit affirmed by the applicant on 9 August 1993). On 13 July 1993, as pointed out
F earlier, the authority, and it was obviously acting under s 29J(2) of the Act, sent a letter to the applicant intimating to him the suspension of his pilot's licence for one month with effect from 15 July 1993 and requiring him to take an oral examination which was to be conducted by the Pilotage Committee.

G *Nature of complaints*

There are two complaints, the first relating to excess of jurisdiction and the other relating to breach of natural justice.

H The first complaint is that no inquiry was held into the conduct of the applicant prior to the suspension of his licence in disregard of s 29I of the Act nor were charges preferred against him. In this regard, the allegation was that the inquiry held on 14 June 1993 by the Pilotage Committee was an inquiry into the nature of the collision, not into the conduct of the applicant.

I The second complaint is that there was non-compliance with the *audi alteram partem* principle in that no charges were preferred against him, no inquiry held against him and no opportunity given him to bring witnesses to rebut allegations of the authority.

Disclosure in affidavits of a more fundamental issue

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I do not think I need to consider the grounds complained of as they remain basically unclear. But what is clear, disclosed in the affidavits and conceded by counsel for the authority, is that there is a more fundamental ground which relates to jurisdiction.

Before going further, it is very instructive to read the judgment of Abdooldader J (as he then was) in *Mak Sik Kwong v Minister of Home Affairs, Malaysia (No 2)*¹ as to the law on the order of certiorari vis-a-vis an order made in excess or without jurisdiction. In particular, this is what his Lordship said at p 176 in respect of the admissibility of extrinsic evidence in determining whether an authority acted in excess of or without jurisdiction:

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It is a settled rule that on all questions of jurisdiction and violation of the principles of natural justice evidence dehors the record can be taken while for all errors of law including error about the law of evidence (*R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at p 144 per Lord Summer), the record is the final authority. Where certiorari is applied for want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible but is as a rule necessary unless the jurisdictional defect is patent (*R v Bolton* [1841] 1 QB 66; *The Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417; *R v Agricultural Land Tribunal for the South-Eastern Area, ex p Bracey* [1960] 2 All ER 518 at p 520; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 223 at p 242 per Browne J). Indeed when the record is silent, evidence beyond the record may be essential (*R v Nat Bell Liquors Ltd* at pp 153 and 160), and in such cases oral evidence may also be admitted (*R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1).

D

E

From the affidavits filed in these proceedings, what has been shown is that the licence that was purportedly suspended was the licence that the applicant had when he was employed by the authority, the respondent. But the applicant left the employment of the authority on 1 December 1992 to join a private limited company, the Klang Port Management Sdn Bhd (see paras 2 and 4 in the affidavit affirmed on 21 February 1994).

F

Under the Act there are two types of pilots' licences for use in a pilotage district:

- (1) licences issued to pilots employed by the relevant port authority — see ss 29C and 29H of the Act; and
- (2) licences issued to pilots who are employees of a licensed operator — see s 29CA.

G

Additionally, under s 29CB, the relevant port authority may, if it considers it expedient, authorize any person to pilot vessels through the authority's pilotage district.

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In this case, the applicant left the employment of the relevant port authority, the respondent, on 1 December 1992. For the period that he worked with the authority (and in the Act such an employee is known as an 'authority pilot') he had a licence which had been issued by the authority for his employment with the authority. When he became an employee of the licenced operator, the Klang Port Management Sdn Bhd, he was not issued with a pilot's licence under s 29CA. And it seems to me the authority was

I

A blissfully unaware of s 29H(5) which rendered the pilot's licence of the applicant, issued by the authority, invalid when he left the employment of the authority. The authority, it would appear, became aware of the provision only after the certiorari proceedings in this case had commenced. Section 29H(5) reads: 'Any licence issued under this section shall cease to be valid upon the termination of any authority pilot's employment with the authority.'

B When the authority purported to suspend the licence of the applicant for one month it must have done so under assumed powers under s 29J(2) which reads:

C The authority may, after considering the findings and recommendations of the Pilotage Committee, suspend or cancel the licence of such authority pilot or employee licenced under section 29CA(1) of a licenced operator ...

The point is the applicant was no longer an authority pilot nor did he have any pilot licence at all when the authority made its decision.

D Thus, when the authority purported to deal with the applicant, the wrong assumption it took was that the applicant was subject to its jurisdiction. It assumed either that the applicant had an authority pilot's licence or that he had a pilot's licence issued to him by virtue of his being an employee of a licenced operator under s 29CA. But there must be in existence jurisdictional facts showing that he had an authority pilot's licence or a licence under s 29CA before the authority can have jurisdiction over the matter. As Abdoolcader J put it succinctly in *Mak Sik Kwong*² at p 177:

E There are two types of facts: facts which an authority (a term I use to include an inferior tribunal, administrative agency or other body exercising judicial or quasi-judicial functions) has undoubted power or jurisdiction to determine; and facts which must exist before an authority can exercise jurisdiction. The latter are known as jurisdictional or collateral facts, the existence of which is a condition precedent for the application of a statutory standard or the assumption of jurisdiction by an authority to decide the case on its merits. Thus, where an authority has power to requisition a vacant house, it is a condition precedent for requisitioning the house that it must be vacant which is a jurisdictional or collateral fact.

G There being an absence of the jurisdictional facts as pointed out earlier, the condition precedent required for the authority to exercise jurisdiction over the applicant in the matter was not fulfilled. In the circumstances certiorari shall issue to quash the decision of the authority to suspend the non-existent licence of the applicant and which required him to sit for an oral examination. The applicant will have the taxed costs of these proceedings.

H *Application allowed.*

Reported by Jeanne Tan